IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. ~~695~~ 50

CITY OF PITTSBURGH, PENNSYLVANIA,
Petitioner,

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, AND UNITED FUEL GAS COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, the City of Pittsburgh, Pennsylvania (Pittsburgh) prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on August 2, 1961, rehearing denied October 5, 1961. A similar petition for a writ of certiorari has been contemporaneously filed by the Solicitor General of the United States on behalf of the Federal Power Commission (Commission).

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit are reported at 293 F. 2d 761,[1] and printed as Appendix A of the petition for certiorari filed in this cause on behalf of the Federal Power Commission (at pp. 22-38 thereof). The orders of the Federal Power Commission (R. 524-540, 585-591) are reported at 24 FPC 204 and 525.[2]

JURISDICTION

The judgment of the Court of Appeals setting aside the Federal Power Commission's orders was entered on August 2, 1961. A timely petition for rehearing, filed by the Commission, was denied on October 5, 1961. The judgment, and order denying rehearing, are printed as Appendix C of the petition for certiorari filed in this cause on behalf of the Federal Power Commission (at pp. 44-46 thereof). The jurisdiction of this Court is invoked under the provisions of 28 USC 1254 (1) and Section 19(b) of the Natural Gas Act, 15 USC 717r(b).

QUESTION PRESENTED

The Commission has made a separate and complete determination, after full hearing, of a proper rate of return on net investment of an interstate transmission company in a rate increase proceeding under

[1] Covering Cases No. 18547 and No. 18597 in that Court. Pittsburgh was an intervening party, on the side of the Commission, in those cases, admitted by order of the Court October 19, 1960.

[2] Relating to FPC Docket No. G-19983. Pittsburgh has been and is an intervener in the proceedings before the Commission, admitted by order of the Commission April 28, 1960.

Section 4 of the Natural Gas Act. The Commission has found that the company, in filing and making effective new rates, was not justified in using a 7% rate of return in its cost of service, and fixed 6⅛% as the proper rate of return.

The question is whether, before it has disposed of other or all issues in the rate proceeding, the Commission may provide immediate relief to ratepayers from the charges established as excess by requiring the interstate transmission company to refile and reduce its increased rates by the amount of the known unjustified excess.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, Act of June 21, 1938, c. 556, 52 Stat. 821-833 as amended 15 USC 717-717w, namely, Sections 4, 5a, 16 and 19(b), are set out in Appendix B of the petition for certiorari filed in this cause on behalf of the Federal Power Commission (at pp. 39-43 thereof).

STATEMENT

Pittsburgh's Relation to the Controversy

Pittsburgh comprises about 700,000 inhabitants, most of whom are consumers of natural gas. Tennessee Gas Transmission Company (Tennessee) is an interstate transmission of pipeline company which sells large quantities of natural gas to distributor companies, including The Manufacturers Light and Heat Company (one of the respondent Columbia Companies), The Peoples Natural Gas Company, and Equitable Gas Company, who resell to Pittsburgh and its inhabitants as consumers.

Pittsburgh has been an intervener, representing its inhabitant consumers, in the rate increase proceedings before the Commission (admitted by Commission order April 28, 1960), and before the Fifth Circuit Court of Appeals (admitted by Court order October 19, 1960), because the increased rates charged by Tennessee to the distributors have been passed on to and are being paid by the consumers under tariff schedules of the distributors effective in Pennsylvania. For like reasons, the Pittsburgh consumers would be beneficiaries of the Commission's so-called interim order of August 9, 1960, which, if left undisturbed, would mean immediately effective lower rates (commencing November 1, 1960) and refunds of preceding excess charges to the consumers (from April 5, 1960 to November 1, 1960).

The Proceedings Before The Commission

The increased rate filing by Tennessee, out of which this controversy flows (identified before the Commission as Docket No. G-19983), is the third in a series of pending, contested and undisposed of annual increases in rates filed by Tennessee. In 1957, Tennessee filed an approximate $24 million annual rate increase (Docket No. G-11980), in 1958 an approximate $20 million annual rate increase (Docket No. G-17166 and in 1959 an approximate $26 million annual rate increase (Docket No. G-19983). Under Section 4 of the Natural Gas Act, each of these increases was suspended by Commission action for the statutory 5 month period and then went into effect, and have been collected as filed, subject to refund, pending determination of their justness and reasonableness by the Commission. Together, the increases represented

a pyramiding of approximately $70 million annually in increased rates.[3]

Hearings have been held in the first docket, No. G-11980, but the case was not complete when hearings began in the third docket, No. G-19983, and the first docket has not yet been determined by the Commission. No hearings have been held in the second docket No. G-17166.

In the third docket, No. G-19983, hearings commenced February 2, 1960 (R. 524). Tennessee presented all of its direct case, but its witnesses were cross-examined only on the issue of rate of return.[4] The FPC staff and one intervener presented evidence on the rate of return only and their witnesses were cross-examined. Tennessee presented rebuttal testimony on rate of return, and cross-examination of this testimony was completed May 25, 1960 (R. 524-525).

When the taking of evidence on rate of return had been concluded, FPC staff counsel moved that the proceeding be divided into two parts:

(1) Determination of the rate of return by the Commission directly, with omission of the hearing examiner's intermediate decision. He further proposed that

[3] The Commission's disputed order of August 9, 1960, in Docket No. G-19983, which directed the refiling to conform with the proper rate of return, if permitted to stand, has the effect of reducing the $70 million overall annual increase by about $10½ million annually from November 1, 1960, onward.

[4] In this docket, the rates were predicated on a cost of service which included a 7% rate of return. The rate of return for Tennessee last approved by the Commission before then had been 6% in 1957, 18 FPC 428. In the two pending dockets preceding No. G-19983, the rates of return used by the company were less than 7%, but more than the 6¼% which the Commission later found to be reasonable in Docket No. G-19983.

if a proper rate of return was less than 7%, the Commission should enter an interim order reducing Tennessee's rates to the extent of the reduced amount and directing corresponding refunds for the past, but using all else of Tennessee's presentation as presented by Tennessee (R. 377-378).

(2) Determination of the other elements entering into the company's cost of service following the usual procedure (which would include the presiding examiner's intermediate decision) (R. 525).

While omission of the examiner's decision on rate of return was unopposed (R. 513), Tennessee and the interveners described as the Columbia Companies (who are respondents here) opposed the interim order procedure (R. 591-606, 607-625). Tennessee relied upon the fact that the proper method of allocating Tennessee's cost of service among its six zones was contested, and that in the pending first rate increase docket for an earlier period of time, No. G-11980, the zone allocation issue (the determination of which the examiner had said would be similarly applied in the current docket) had been tried and was awaiting decision by the hearing examiner.

On June 17, 1960, the Commission granted the motion to omit an intermediate decision of the examiner on the rate of return, and provided for oral argument on the merits of the rate of return and on the procedure of ordering interim rate reductions and refunds if 7% was found excessive (R. 513-516). On June 19, 1960, by motion, Tennessee requested the Commission to waive the intermediate decision procedure on the zone allocation issue in Docket No. G-11980 and to decide that issue simultaneously with the rate of return issue

in this proceeding, No. G-19983 (R. 519-520). The Commission denied this motion on August 5, 1960 (R. 521-523).

On August 9, 1960, the Commission entered the order disputed below, which determined that an overall rate of return of 6¼% was fair, just, and reasonable for Tennessee. The order disallowed the rates computed at 7%, directed Tennessee to file interim reduced rates (subject to possible further refund at the end of the entire case) effective April 5, 1960, when the originally filed rates went into effect, and ordered Tennessee to make refunds from that date for any sums collected in excess of the interim reduced rates (R. 524-540). The Commission stated that in requiring Tennessee to substitute rates founded on a proper rate of return but otherwise using the company's own claims, Tennessee and its customers were put in the same position as if Tennessee had originally filed increased rates on a proper rate of return.

The Commission denied applications for rehearing by Tennessee and the Columbia companies, on September 27, 1960 (R. 585-591). Both applications attacked the interim order procedure, and Tennessee challenged the decision on the 6¼% rate of return. The Commission pointed out that the order of August 9th providing for the filing of lower rates based on the 6¼% return would result in a savings to Tennessee's jurisdictional customers of about $11 million annually. The substitute filing, made in November 1960, has resulted in an annual revenue reduction, in relation to test year figures, of about $10¾ million.[5]

[5] Stays of the reduction and refund order were denied by the Fifth Circuit, Judge Wisdom dissenting. *Tennessee Gas Transmission Co. v. Federal Power Commission*, 283 F. 2d 729 (5 Cir.).

The Proceedings in the Fifth Circuit

The Court below unanimously affirmed the Commission's determination that 6¼% was a just and reasonable rate of return for Tennessee.

On the interim order procedure, however, by a 2 to 1 vote, Chief Judge Tuttle dissenting, the Court set aside the Commission order to the extent that it required Tennessee to make immediate refunds[6] and to make lower rates effective immediately. The majority view was that the lack of a Commission decision on cost-allocation by zones meant there was no basis for determining which of the filed rates in specific zones were lawful; that while the allocation of costs in all the schedules was made by Tennessee and the burden rests on it to justify each rate increase, the company should not be held at its peril to foretell the decision of the Commission on the correctness of the increased rates; that, until the Commission fixes the rates, the company is protected by being allowed to collect at the filed rate and the consumer is protected by the company's obligation to refund any excess charges with interest; and finally, regardless of the Commission's authority to issue the order, the cost-allocation among zones is such an essential element in determining whether filed rates are excessive that it was an abuse of discretion to issue an interim rate order before deciding the allocation issue.

Chief Judge Tuttle, dissenting, would have affirmed the Commission's order giving immediate effect to the conclusion that the rates based on the excessive rate of return were unreasonable. In his view, under the

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[6] Tennessee has refunded over $7¼ million for the period April 5, 1960 through October 31, 1960.

Natural Gas Act, Tennessee has the burden of establishing the validity of each element in its rate increase filing, including the cost allocations which it makes; and Tennessee cannot complain if it is placed, by the Commission's order, in the position it would have occupied initially had it based its rates on a proper rate of return.

On October 5, 1961, the same panel of the Court, Chief Judge Tuttle again dissenting, denied the Commission's petition for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The decision below has impaired the continued ability of the Federal Power Commission to use an important procedural device for curbing, at least in part, unwarranted rate increases and collections of excess rates by interstate natural gas companies from customer purchasers and consumers of natural gas. The Fifth Circuit decision is in conflict with decisions of the Third and Eighth Circuits, and inconsistent with the views of this Court in *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U.S. 575, 583-585.

1. The Importance of the Interim Order Procedure. In keeping with the primary purpose of the Natural Gas Act "to protect the consumer interests against exploitation at the hands of private natural gas companies" (*Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 612), the interim order procedure may serve both as a direct remedy for consumers and as a deterrent to the interstate pipeline companies in the overstating of rate claims and the collection of unwarranted increases. The very existence (and validity) of the interim order procedure

as a potential remedy, even if put to use only infrequently, is most important to discourage the filing of exaggerated claims and rates based thereon. As used, and if upheld, in this case, it demonstrates that the Commission need not and will not stand by during the pendency of lengthy rate increase cases and permit the unjustified collection of huge sums in excess rates from customers and consumers, where some of the issues upon which the increases rest are subject to early separable examination and the justification is found to be deficient.

In this connection, the operative considerations which tend to foster the exaggerated claims and rate filings are that:

(1) In the first instance, the interstate pipeline companies are in a position to put rate increases into effect without any dollar limitation or other measurable criterion (*United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103; *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332).

(2) The usual pipeline rate increase case (encompassing Commission investigation and review by hearing) involves many issues and parties and often takes years for final disposition.

(3) Multiple rate increases may be filed by the same company and made effective before its first increase has been passed upon by the Commission. The respondent pipeline company, Tennessee, affords a good illustration of both this and the previous point, with three unresolved but effective increases filed in 1957, 1958, and 1959, respectively.

(4) The obligation of the pipeline company to ultimately refund with interest any sums found excess

is not a deterrent to unreasonable increases, apparently because of the huge store of capital involuntarily provided by the ratepayers at a worth exceeding the actual cost to the company. Treated as equity capital, these funds earn a much higher rate of return than their cost, for while the company makes refunds with 7% interest, it recoups a large part of the interest (about half, if the company is in the 52% tax bracket) as an income tax deduction. On the other hand, as noted hereinafter, the ultimate refund is not an adequate recompense to the ultimate ratepayer in contrast to the initial payment of lower rates; and industrial consumers, as distinct from other consumers, derive no refund protection from the suspension provisions of the Natural Gas Act (Section 4(e)).

That there is nothing mythical about the piling up of overstated rate increases is shown by some few statistics furnished by the Commission in its petition for certiorari (p. 19). At the end of fiscal year 1961, 41 pipeline companies were involved in pending rate increase proceedings. On an annual basis, the companies were collecting about $375 million in unapproved increases. From past experience (using the 31 pipeline rate cases concluded in fiscal 1961 as an example) it would appear that a substantial portion of the total increases will be found unjustified (for fiscal 1961, the portion was 37%). More than half of the total disallowances in fiscal 1961 (about 56%) came from reduction of the claimed rates of return on net investment (the area covered by the interim order in this case).

In the case of the respondent Tennessee, of the total $70 million annual increase effectuated by its three pending rate increase filings, the Commission has

already disallowed an estimated $10^{3}/_{4}$ million annually in current rates (about 23%) by reducing one item, the claimed rate of return in the third docket, and it appears that the FPC staff contends that an additional $36 million should be disallowed.

2. The Authority of the Commission to Use The Procedure, and The Judicial Support For It. Opposed to the enumerated considerations which tempt, and tend to foster, the filing of excessive rate increases, is the obligation of the interstate natural gas company to justify to the Federal Power Commission the justness and reasonableness of the increased rate (Section 4(e), Natural Gas Act). Unfortunately for the consumer, this burden of proof is usually put to the test long after the increases have been effectuated, rather than earlier. Hence, in keeping with the express duty on the Commission (also imposed by Section 4(e)) to decide increased rate questions as speedily as possible, the basic Commission duty under the Act to protect consumers from the burden of paying excessive rates, and the broad rulemaking and ordering powers (Section 16), it would certainly appear that the Commission may adopt procedures to quicken the pace of proof, justification, and correction, including the early separate treatment of issues which lend themselves to such handling.

The rate of return issue decided in this case is an outstanding example of a separable issue which can receive early treatment. In contrast to other types of issues, rate of return requires no extensive field investigation by the Commission staff (see FPC Annual Report 1960, p. 2), and it presents a repetitive broad judgment question with which the Commission is quite familiar without being materially aided by a

hearing examiner's decision. On the other hand, the allocation issue discussed by the Court below, and certain other issues, appear to present problems in novelty and investigation which not only take longer to develop, but are of a nature that the Commission's consideration of them is enhanced by a hearing examiner's decision.

The obstacle to this separation, and separate corrective action, was expressed in the view of two of the three judges who sat below, that a later determination of the allocation issue might affect the earnings expected on the rate of return in each of the six zones used by Tennessee, particularly if the Commission approved an allocation formula different from that used by Tennessee; hence it was unreasonable to compel Tennessee to make a pro tanto correction of its rates before the allocation issue was decided.

The majority below appears to have overlooked the fact that in deciding on the reasonableness of one severable item of the cost of service, to wit, the proper rate of return, the regulatory agency does not guarantee to the company that such a return will be earned, overall or by zones. On the contrary, the regulatory agency has held only that the rate of return it fixed is proper on the basis of a test year, and that rates which will produce that return in the future are permissible, collectible rates. All else of the company's presentation and claims remains, for the present, undisturbed.

The view of the majority below fails to give appropriate weight to both the initial rate making capacity of the pipeline company, and the ultimate burden of proof on it. Tennessee, in keeping with

the concept of the statute, put together the various components constituting a cost of service upon which it based its increased rates, put the rates into effect, and then urged justification in the hearings before the Commission.

In terms of making the temporary or interim correction, the Commission has accepted each element of Tennessee's cost of service as presented by Tennessee, including the zone allocations devised by Tennessee, except the element of rate of return, which has been fully explored and modified to 6⅛% (the latter result affirmed by the Court of Appeals). The pipeline company cannot complain if all of its presentation continues to be given effect in rates except the one element which the company could not justify and which has been properly revised downward.

The view of the Fifth Circuit is not consonant with the views of this Court expressed in *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U.S. 575, 583-585, where this Court upheld an interim order (in a Section 5(a) rate investigation) reducing rates. The Court recognized as appropriate the two step procedure of first "adjustment of the general revenue level to the demands of a fair return", and second, "adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details." In sustaining the interim order, the Court held that the companies were not hurt because the Commission had entered the order on the basis only of the companies' presentation of testimony, without cross-examination of such testimony or testimony by Commission witnesses, 315 U.S. at 584 (a situation much less complete than the instant case where the entire testimony and cross-examination was

submitted on both sides of the issue covered by the interim order).

In *Panhandle Eastern Pipeline Company* v. *Federal Power Commission*, 236 F. 2d 606 (3 Cir.), the Third Circuit rejected the company's claim that no reduction of a rate increase could be ordered until all phases of the case had been resolved. The Court held that the company had been given the opportunity to offer all of its evidence in support of the severable elements of its claim, and had, in the view of the Commission, failed to make a prima facie showing in support thereof; therefore the Commission was under no obligation to postpone its disallowance of the items (providing a rate reduction of about $5 million annually).

In *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690, 715-716 (8 Cir.), cert. denied 346 U.S. 922, the Eighth Circuit affirmed an interim reduction of approximately $7½ million in increased rates filed by Northern Natural Gas Company, comprising elements as to which the Commission was of the view that the company had not made out a case.

In both of these cases there remained other issues, including allocation matters, to be disposed of by the Commission, but the rationale of the holdings is that the natural gas companies cannot continue to rely, and collect rates predicated, upon elements in the cost of service which have been found by the Commission to be overstated and unjustified.

3. The Inadequacy Of Refunds. The Court below appears to have assumed that the consumers, who continue to pay the excessive rates, are amply protected by the obligation of the pipeline to refund the excess

charges with interest. Unfortuntely, for the ordinary householder, in contrast to the initial payment of lower rates and holding the line against cost-of-living increases, the overpayment and refund process is a poor substitute. Indeed, in this very case, after Tennessee had been directed to provide a refund for the period April 5—October 31, 1960 (and had been denied a stay, 283 F. 2d 729), Pittsburgh complained, without avail, in a motion filed with the Commission January 17, 1961, that much of the refund was not flowing through to consumers because of Tennessee's methods in disbursing the refund to the distributor companies.

Mr. Justice Douglas has pointed out (*United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 119, dissenting opinion) and the Commission has recognized (*FPC Annual Report* 1953, p. 101) that the protection to consumers given by the refund provision of the Natural Gas Act is far from complete. Consumers are ambulatory, and in the years between the excess collection and the usual refund the consumer population for given areas invariably shifts. The administering of a refund at the consumer level is therefore not only something in the nature of an approximation, but also involves administrative detail and expense which comes out of and reduces the refund.

In the case of industrial consumers, as distinct from other consumers, since the Commission has no authority to suspend rates for resale for industrial use only, many of the industrial consumers do not have the benefit of a bond or obligation to refund for excessive rates collected, *Pacific Natural Gas Company* v. *Federal Power Commission*, 276 F. 2d 350 (9 Cir.); *Gas Service Company* v. *Federal Power Commission*, 282 F. 2d 496 (DC Cir.); *Mississippi Valley Gas Com-*

pany v. *Federal Power Commission*, — F. 2d — (5 Cir., No. 18501, Sept. 12, 1961). For these consumers, there is not even the imperfect protection of the refund obligation.[7]

Hence every legitimate step which the Commission can devise to accelerate partially, as well as in toto, the reduction of overstated rates and collections, in place of the less satisfactory, and less adequate, refund method, is in keeping with the letter and spirit of the Natural Gas Act, and deserving of judicial support.

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[7] While all of respondent Tennessee's rate increase schedules in the litigated docket appear to have been suspended, so that any industrial users of the gas coming thereunder may not necessarily lack refund protection, in certain pending cases where the FPC staff is desirous of having the interim order procedure applied, the industrial consumers do not have any refund obligation protection. An example is the pending *Cities Service Gas Company* rate increase, FPC Docket No. RP 62-1. Unless the cloud on the interim order procedure cast by the decision of the Court below in the instant case is removed by this Court, it is doubtful that the interim order procedure would be applied in the *Cities Service* case or any other case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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